

**BEFORE**  
**THE PUBLIC SERVICE COMMISSION OF**  
**SOUTH CAROLINA**  
**DOCKET NO. 2014-346-WS**

IN RE:	)	<b>DIUC’S OPPOSITION TO</b>
	)	<b>ORS MOTION TO STRIKE</b>
Application of Daufuskie Island Utility	)	<b>AFFIDAVIT OF</b>
Company, Inc. for Approval of an	)	<b>JOHN F. GUASTELLA</b>
Increase for Water and Sewer Rates,	)	
Terms and Conditions.	)	
_____	)	

**RELEVANT FACTS AND PROCEDURAL HISTORY**

After nearly six years of litigation, including two appeals, the parties to this matter finally reached agreement as to settlement terms.<sup>1</sup> The negotiations for these settlement terms, which were lengthy and involved the exchange of multiple drafts and terms over a period of months, eventually culminated in the filing of a Settlement Agreement on February 18, 2021, and a Proposed Consent Order Approving Settlement on February 19, 2021. DIUC and ORS also both submitted prefiled testimony in support of the proposed Settlement Agreement and Consent Order.<sup>2</sup>

Via Order 2021-132, entered March 30, 2021, the Commission approved the Settlement Agreement, finding it is “just, fair, and reasonable, is in accord with applicable law and regulatory policy, and is in the public interest.” Order 2021-132 at p. 7. Pursuant to the Order, DIUC was

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<sup>1</sup> The Parties to this proceeding are: Daufuskie Island Utility Co., Inc. (“DIUC”); Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc., Bloody Point Property Owner's Association (collectively referred to herein as the “POAs” or “Intervenors”); and the S.C. Office of Regulatory Staff (“ORS”).

<sup>2</sup> In support of the request for approval, DIUC filed a copy of the Settlement Agreement and the Verified Settlement Testimony of John F. Guastella. ORS filed the Verified Testimony of Dawn M. Hipp.

permitted to “implement the 2021 Rates, (as defined in the Settlement Agreement and reflected in the attachments thereto) for services beginning March 1, 2021,” and to “include the same in its April 1, 2021, quarterly billing.” *Id.*

The Parties did not reach an agreement as to DIUC’s request for reparations. DIUC asserts that the temporary rates permitted by Order 2015-846 and then by Order 2018-68 were confiscatory and unconstitutional and therefore seeks reparations. DIUC also seeks to recoup certain refunds it was required to make in January 2018. ORS and Intervenorors disagree with DIUC’s position. Paragraph 8 of the Settlement Agreement is the Parties’ agreement to allow the Commission to resolve the reparations/refunds issue. It also includes the Parties’ negotiated mechanism for the issues to be resolved, stating:

- a. By way of compromise, the Parties jointly request the Commission adopt and implement DIUC’s 2021 Rates then allow the Parties to present their positions regarding the reparations via written submissions. The Parties agree these issues may be decided on their respective submissions to Commission.
- b. After Commission approval of this Settlement Agreement and the issuance of an Order permitting implementation of the 2021 Rates, the Parties shall proceed to present their respective positions to the Commission regarding the DIUC request for reparations. [...]
- c. The Parties agree their written submissions should be filed as follows:
  - i. DIUC submissions due 30 calendar days after it has provided notice and opportunity to be heard as outlined in Paragraph 8(b) above;
  - ii. ORS and Intervenorors submissions due 21 calendar days after filing of DIUC submissions; and
  - iii. DIUC Reply submissions due 10 calendar days after filing of ORS and Intervenorors submissions.

Settlement Agreement, submitted February 18, 2021.

In approving the Settlement Agreement, Commission Order 2021-132 adopted the Parties’ proposed procedure. *See* Order 2021-132 (“The Settlement Agreement contains a procedure whereby

after this Commission's decision regarding the proposed Settlement Agreement, the Parties can brief the matter to the Commission for its further determination in this case. The Settlement Agreement provides for notice and a briefing schedule on this issue.”).

On May 17, 2021, pursuant to the procedure outlined in Order 2021-132, DIUC timely filed its Submission in Support of Request for Reparations. The twenty-five page Submission presents detailed arguments in support of the reparations relief and refunds sought by DIUC. The Submission also attaches two exhibits: *Exhibit A* - a schedule to show the Commission the amounts at issue and how the DIUC proposes the requested relief be implemented, and *Exhibit B* - an affidavit explaining DIUC's reasons for the requested relief and supporting its calculation of the proposed implementation. See *Exhibit A* (Remediation / Reparation Schedule, May 17, 2021) and *Exhibit B* (Affidavit of John F. Guastella).

On May 27, 2021, ORS filed a Motion to Strike the Affidavit of John F. Guastella from DIUC's Submission in Support of Request for Reparations. The Motion also asks this Commission to strike the Remediation/Reparation Schedule submitted as *Exhibit B* to DIUC's Submission.<sup>3</sup> However, as explained herein, none of the positions asserted by the ORS Motion justify the relief sought. As such, the Motion should be denied.

### **1. ORS IS ATTEMPTING TO REWRITE THE SETTLEMENT AGREEMENT.**

The goal of the Motion to Strike is to attempt to convince this Commission that when a contract contains the term “written submission,” it means something much more restrictive than its plain language. The operative phrase, as negotiated, in the Settlement Agreement is:

***By way of compromise, the Parties jointly request the Commission ... allow the Parties to present their positions regarding the reparations via written submissions.*** The Parties agree these issues may be decided on their respective submissions to Commission.

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<sup>3</sup> The Motion never specifically discusses *Exhibit B* or why it should be excluded.

Settlement Agreement at ¶8.a. (***double emphasis added***). Notably, there is no express limitation to the form, the content, the attachments or --as ORS suggests-- that the “written submissions” can only be what ORS now calls a “brief.”

“In South Carolina jurisprudence, settlement agreements are viewed as contracts.” *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). Because the Settlement Agreement here is a contract, the Settlement Agreement is subject to the same rules of interpretation as any contract. *Id.* at 241-42, 802 (“General contract principles are applied in the construction of a settlement agreement because, as stated above, a settlement agreement is a contract.”); *see also Allegheny Cas. Co. v. Netmoco, Inc.*, No. 2013-UP-097, 2013 WL 8482391, at \*3 (S.C. Ct. App. Mar. 6, 2013) (“[B]ecause South Carolina law views settlement agreements as contracts, these same principles determine whether summary judgment, based upon a particular interpretation of a settlement agreement, is proper.”).

Accordingly, the terms of the Settlement Agreement, as any other contract, should be given their plain meaning, especially if their terms are unambiguous, as the terms are here. *See Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) (“Where the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect.”). These rules of interpretation, according to the South Carolina Supreme Court, focus on plain language used in the agreements. *See Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 497, 579 S.E.2d 132, 135 (2003) (“[T]his Court is required to give effect to the plain meaning of the words in an unambiguous contract.”); *see also Bardsley v. Gov't Emps. Ins. Co.*, 405 S.C. 68, 76, 747 S.E.2d 436, 440 (2013) (“It is a well-settled principle of contract interpretation

that absent a contractual definition to the contrary, contract language is given its ordinary and plain meaning.”).<sup>4</sup>

In order to grant the ORS Motion, this Commission would have to ignore the intent of the parties as demonstrated by the plain language of the Settlement Agreement and find that in reaching the Settlement Agreement DIUC did not contemplate filing anything with its written submission to support or explain the relief requested. That is not a logical result when the plain, clear language of the Settlement Agreement states that the Parties agree to “present their positions regarding the reparations via written submissions.” Settlement Agreement at ¶8.a.

The Settlement Agreement further states that “The Parties agree these issues may be decided on their respective submissions to Commission.” *Id.* Now, however, ORS wants the Commission to change the definition of the term “written submissions” to something else that is more limited and inconsistent with the plain language of the Settlement Agreement. Essentially, ORS wants the Commission to declare what the parties intended when they entered into the Settlement Agreement and asks the Commission to conclude something that is contrary to the plain language of the Agreement. That is not proper, as the Commission is required to honor the plain language of the Settlement Agreement.

If ORS’s position is accepted, then the Commission would allow ORS to place DIUC in an impossible position. If DIUC had not been allowed to and therefore not submitted an explanation for the way it planned to calculate the reparations via *Exhibits A and B (Ex. A: Remediation / Reparation Schedule and Ex. B: Affidavit of Gusatella)*, then ORS would have surely taken the position that DIUC had somehow failed in supporting its request because it was

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<sup>4</sup> See also Settlement Agreement at ¶16 (stating the Parties’ agreement that “This Settlement Agreement shall be interpreted according to South Carolina law.”).

not clear how DIUC intended to calculate the requested reparations/refunds or how DIUC would apply the ruling. After all, DIUC is required to candidly and fully explain the facts to this Commission. See S.C. Reg. § 103-819 (“All pleadings filed with the Commission *shall* include “A concise and cogent statement of the facts such person is prepared to present to the Commission.”). Contrary to the result ORS seeks, the goal of any matter before the Commission is to ensure a complete presentation to the Commission of the facts and analysis necessary to permit the Commission to make its most reasoned decision.

There is no reason to strike the affidavit included with the written submission based on the Settlement Agreement’s plain language. DIUC’s Submission in Support of Request for Reparations complies with the terms of the Settlement Agreement.

## **2. THE AFFIDAVIT AND SCHEDULE DO NOT VIOLATE SC RULE OF EVIDENCE 702.**

The Motion claims that the Affidavit is flawed because the Affidavit includes legal opinions when it “discusses ‘the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 13 of the South Carolina Constitution.’” Motion at 3 (citing Affidavit Paragraphs 12, 13, and 15).

The allegedly offensive Paragraphs cited by the Motion are Paragraphs 12, 13, and 15:

12. It is not lawful for a utility regulatory commission to refuse rate relief in an amount adequate to provide a utility with an opportunity to pay actual costs and to earn a reasonable return, or deny recovery of specific utility investments.
13. As explained in DIUC’s Submission in Support of Reparations and as is demonstrated by the record of proceedings and filings to date in Docket 2014-346-WS and in South Carolina Supreme Court Appellate Cases 2016-000652 and 2018-001107, the rates permitted by Commission Orders 2015-846 and 2018-68 were constitutionally insufficient and, as such, the reparations now requested by DIUC are necessary to remedy violation of DIUC’s federal and state constitutional rights.

15. The deficient rates prior to March 1, 2021, violate the protections guaranteed to DIUC by the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 3 and 13 of the South Carolina Constitution.

ORS asserts that these three Paragraphs present “Mr. Guastella’s unqualified legal opinion,” which should not be considered. ORS complains that the Paragraphs should be excluded pursuant to S.C. Rule of Evidence 702.

The ORS Motion builds its argument on the premise that, “Pursuant to S.C. Code Ann. Reg. § 103-846, the South Carolina Rules of Evidence shall be followed in proceedings before the Commission.” Motion at 2. However, S.C. Code Reg. § 103-846 addresses the taking of evidence at hearings before the Commission. The Regulation ORS relies upon is nestled among the Sections of Article 8 that address hearings and the admission of evidence at a hearing.

103-840	Consolidated Hearings
103-841	Presiding Officer
103-842	Order of Procedure for Hearings: <ol style="list-style-type: none"> <li>1. Investigations,</li> <li>2. Applications and Petitions, and</li> <li>3. Complaints.</li> </ol>
103-843	Standard of Conduct During Proceedings
103-844	Failure to Attend a Designated Hearing
103-845	Witnesses Before the Commission
<b>103-846</b>	<b><i>Evidence at Hearings</i></b>
103-847	Documentary Evidence
103-848	Exhibits

Clearly, S.C. Regulation 103-846 intends to apply the Rules of Evidence to actual hearings, not briefing or other proceedings before the Commission, as ORS suggests. Contrary to ORS’s suggestion, Regulation 103-846 does not subject all filings in a case to the S.C. Rules of Evidence; that would create an absurd result. Even if that were not the case, Article 8 also provides for

written submissions. For example Regulation 103-845 states, “A prepared statement of a witness may be received as an exhibit.” S.C. Code Regs. § 103-845(C), *Prepared Statements and Exhibits*. The Affidavit is a prepared statement of Mr. Guastella.

Even assuming S.C. Rule of Evidence 702 applies to the analysis at hand, Rule 702 clearly does not require or support the drastic relief ORS seeks by asking that the affidavit be struck from DIUC’s currently written submission *before* it is even determined if the Commission wishes to hold a hearing on the question of reparations and refunds.

South Carolina Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise

In Paragraph 14 of his affidavit, Mr. Guastella, as the manager of DIUC, explains the facts. The level of rates provided by the previous orders were too low to allow DIUC “to pay actual costs and to earn a reasonable return” and that they did not allow “recovery of specific utility investments.”

Specifically, and without any remotely *legal* opinion, Guastella’s Affidavit states the facts:

- ♦ I have had ample opportunity to examine impact of the Commission's rate orders in this proceeding.
- ♦ The rates allowed by Order 2015-846 and Order 2018-68 did not generate rates sufficient for DIUC to earn a reasonable rate of return.
- ♦ The rates have negatively impacted the financial integrity of DIUC and failed to generate sufficient revenue for payment of all expenses, debt service, and capital costs of the business.
- ♦ Further, the rates failed to allow the owner of DIUC to earn a return upon equity commensurate with returns on investments in other enterprises having corresponding risks and the rates were not sufficient to assure confidence in the financial integrity of the utility, so as to maintain its credit and to attract capital.

Affidavit at ¶14. There is no legal opinion in this Paragraph.



Despite asking the Commission to strike the entirety of the Affidavit, ORS's objection really seems to be with Paragraphs 12, 13, and 15 of the Affidavit. As further set forth below, even though these paragraphs contain some additional analysis by the affiant, that does not render any portion, much less all of, the Affidavit an improper broad reaching legal opinion, as alleged by ORS. The Affidavit includes the analysis presented by DIUC in support of its request for relief and it is the testimony of its manager, designed to assist the trier of fact.<sup>5</sup>

As part of the DIUC "written submission" in support of its request for reparations, the Affidavit complies with the plain language of the Settlement Agreement and is appropriate under South Carolina law. Mr. Guastella is an expert, a businessman in the industry. He knows and understands law and regulations. It is part of his job to know and understand law and regulations. Because of this knowledge and understanding for his job, Mr. Guastella is not offering a legal opinion by discussing law and regulations; he is merely discussing knowledge he acquired over the course of his employment and experience.<sup>6</sup> Courts routinely recognize this distinction and allow witnesses to testify as to knowledge that may appear to be a legal conclusion within their expertise, especially when it assists the trier of fact. For example, in *Vortex Sports & Ent., Inc. v. Ware*, 378 S.C. 197, 208, 662 S.E.2d 444, 450 (Ct. App. 2008), a law professor who specialized in business law, agency and partnerships, and who was qualified as an expert witness, was

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<sup>5</sup> Should the Commission find that ORS's Motion to Strike has presented credible grounds for relief that are not contrary to the plain language of the Settlement Agreement, DIUC submits the only relief necessary relates to the Paragraphs of the Affidavit that ORS claims raise any sort of legal issue – specifically, Paragraphs 12, 13 and 15 could be struck leaving the remainder of the Affidavit as submitted. ORS presents no reason to strike *Exhibit A* to the DIUC Submission, which is entitled *Remediation / Reparation Schedule (May 17, 2021)*. *Exhibit A* merely shows DIUC's proposed calculation and application of the relief requested and, accordingly, should remain for the Commission's consideration.

<sup>6</sup> In at least two hearings in this proceeding, as well as in other proceedings, this Commission has reviewed Mr. Guastella's expert credentials and has allowed him to testify as an expert. Accordingly, his qualifications are not herein repeated.

permitted to testify as to whether defendant breached a fiduciary duty, which is a legal issue. In considering the testimony, the Court of Appeals concluded as follows:

We find Professor Freeman's testimony consisted of specialized knowledge that assisted the trier of fact to understand the evidence or to determine a fact in issue. He was qualified as an expert, and thus, was allowed to testify as to his opinion relating to those facts. **He did not make improper legal conclusions or instructions but simply opined regarding acts Ware committed that breached his fiduciary duty.**"

(emphasis added). This ruling is consistent with other courts' admission of similar testimony analyzed under the comparable Federal Rule of Evidence 702. For example, the Second Circuit Court of Appeals held in a tax case that the trial judge did not err by allowing an IRS agent/expert witness to testify about the proper functioning of the tax system. *See United States v. Duncan*, 42 F.3d 97, 102 (2d Cir. 1994) ("These questions, however, did not ask the witness to express legal conclusions, but only to explain sophisticated aspects of a regulatory system for which the witness had expertise.") (emphasis added); *see also Antrim Pharms. LLC v. Bio-Pharm, Inc.*, 950 F.3d 423, 430–31 (7th Cir. 2020) ("... courts have permitted regulatory experts to testify on complex statutory or regulatory frameworks when that testimony assists the jury in understanding a party's actions within that broader framework."); *United States v. Poulin*, 461 F. App'x 272, 282 (4th Cir. 2012) (allowing witnesses to testify that they thought altering documents was illegal then ruling "This testimony, therefore, did not simply tell the jurors what result to reach; instead, it helped them to understand the pertinent facts and was relevant to the issue of whether Poulin had the requisite intent to obstruct an investigation.")

Mr. Guastella is an expert. He is well versed in laws and regulations and acquired this knowledge through his long, successful career in utility regulation. It is expected and necessary for an executive to understand the law that impacts his job/expertise. Discussing those regulations is part of his job and knowledge about them is part of his expertise. Allowing the information to

go to the trier of fact assists the trier of fact in understanding industry standards. As such, Mr. Guastella can offer testimony and opine on these topics. This Commission should not strike his affidavit.

**3. ORS REPEATEDLY ALLOWS THE USE OF AFFIDAVITS IN SUBMISSIONS TO THE COMMISSION. SIMILARLY, OTHER COURTS LIKEWISE PERMIT THE USE OF AFFIDAVITS.**

Throughout this proceeding and in other cases, ORS routinely relies upon affidavits filed into the record of the case. The following are examples of affidavits filed in this proceeding. At no time did ORS object.

- ♦ Affidavit of Publication 7/29/2015
- ♦ Affidavit of Mailing 7/30/2015
- ♦ Publisher's Affidavit 8/28/2015
- ♦ Affidavit of Guastella 1/20/2016
- ♦ Affidavit of Guastella 10/16/2017
- ♦ Affidavit of Lee 9/3/2020

Now, for the first time in this six-year-old proceeding, ORS asserts that considering an affidavit (presumably for any reason at all) in a contested case “would render meaningless the protection afforded ORS by the APA.” Motion at 4. It is disingenuous for ORS to assert that DIUC has somehow violated the Administrative Procedure Act by filing an affidavit. Affidavits are routinely used in administrative and regulatory matters and affidavits have, in fact, been filed in this case without any objection from ORS.

There is simply no legitimate dispute that affidavits are acceptable when courts or this Commission are deciding motions or legal issues. South Carolina Rule of Civil Procedure 43(e) specifically address affidavits: “(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective

parties.”<sup>7</sup> SCRCP 43(e). Affidavits are consistently admitted in court proceeding and hearings. *See, e.g., Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 140, 494 S.E.2d 449, 453 (Ct. App. 1997); and *Lorenzen v. Montgomery Cty. Bd. of Educ.*, 403 F. App'x 832, 834 (4th Cir. 2010).

It should also be noted that the ORS Motion to Strike cites S.C. Code § 1-23-330 for the proposition that “any information offered into the record must be subject to objection and cross-examination.” Motion at 3. That is not an accurate statement of the cited statute. In relevant part, Section 1-23-330(1) merely states:

(1) ... Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, **any part of the evidence may be received in written form;**

(3) Any party **may** conduct cross-examination;

S.C. Code § 1-23-330(1) and (3) (emphasis added). Accordingly, the use of written submissions is completely authorized. Furthermore, the Code section states that any participating party “may” conduct cross examination. There is **no** requirement that the Commission only accept live testimony, and despite ORS’s assertion, there is no requirement that there “must” be cross-examination.

ORS’s reliance on S.C. Code 1-23-330 to strike the Affidavit is unfounded and the Motion should be denied.

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<sup>7</sup> The Rule continues by explaining that a South Carolina tribunal court “may [also] direct that the matter be heard wholly or partly on oral testimony or depositions.” Should the Commission prefer to proceed with oral testimony from Mr. Guastella, DIUC has no objection.

**CONCLUSION**

ORS has failed to justify the relief sought by its Motion to Strike. Its alleged grounds are not credible, the relief requested is inconsistent with ORS's previous positions. Most importantly, the Motion is just ORS's attempt to have the Commission to rewrite the Parties' Settlement Agreement. Accordingly, the Motion should be denied.

Respectfully submitted,

/s/ Thomas P. Gressette Jr.

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June 17, 2021  
Charleston, South Carolina

**CERTIFICATE OF SERVICE**

This is to certify that on June 17, 2021, I caused to be served upon the counsel of record named below a copy of the foregoing via electronic mail, as indicated. A copy was also filed via the Commission's DMS.

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/s/ Thomas P. Gressette Jr.

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